RECENT CASES

BANKRUPTCY.

Section 4 of the Bankruptcy Act of 1898 provides that, "Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." In *re Walrath*, 175 Fed. 243 (1910), raises the question, whether an infant is such a person. It is answered in the affirmative.

Are Infants Entitled to Adjudication?

The infant in this case was liable on a judgment recovered in an action of negligence. The Court held this was a debt in respect to which the infant was under no disability. That being so, he is legally liable to pay it and can't possibly avoid it. He is, therefore, a person who owes debts and is entitled to the benefits of the act. The reasoning seems sound and the same decision has been reached in the case of an infant engaged in business, who is rendered by statute absolutely liable for debts contracted in the business. See *In re Brice*, 93 Fed. 942 (1899).

On the other hand in cases where the only debts exhibited are ones which the infant may disaffirm, it has been held, he is not such a person. *In re Fidemiller*, 105 Fed. 595 (1900). This would seem to be in line with the reasoning of our principal case.

CONSTITUTIONAL LAW.

A statute provided that in case of loss of life by any person employed in a coal mine, occasioned by a failure to comply with the provisions of the act by the owner of the mine, a right of action should accrue to the "widow" or lineal heirs of the decedent for damages for the injuries they shall have sustained. Act of June 2, 1891 (Pa. Pamphlet Laws, 207). It was held in a recent case that the word "widow" did not include a non-resident alien widow, and hence an Italian subject, residing in Italy, could not recover under the statute for the death of her husband. *Debitulia* v. *Lehigh & Wilkesbarre Coal Co.*, 174 Fed. (Pa.) 886 (1909).

Rights of Non-Resident Aliens

The right of a non-resident alien to maintain an action under this particular statute had never been decided, but the court considered itself bound by decisions of the Pennsylvania Supreme Court under the similar statutes of April 15, 1851 (P. L. 674), and April 26, 1855, P. L. 309. *Deni* v. *Pennsylvania R. R. Co.*, 181 Pa. 525 (1897); *Marovano* v. *Baltimore & Ohio R. R. Co.*, 216 Pa. 402 (1907). These decisions are based on the principle that the statutes of a State, in the absence of an express provision to the contrary, apply only to persons within the jurisdiction of the State. Wisconsin also supports this doctrine. *McMillan* v. *Spider Lake S. & L. Co.*, 115 Wisc. 332 (1902).

The other jurisdictions in construing similar statutes hold that the non-resident alien is within the language and intent of the act. *Davidson* v. *Hill*, 2 K. B. 606 (1901); *Olfson* v. *Bush Co.*, 182 N. Y. 393 (1905); *Mulhall* v. *Fallon*, 176 Mass. 266 (1900). These cases are decided on the theory that the acts are to a large extent punitive, and since they confer a benefit and not a burden, they should be held to apply independently of residence or nationality. For a full discussion of the principle involved, see 57 Am. Law Reg., 171.

CONSTITUTIONAL LAW (Continued).

A good example of the curious cases which to-day arise, owing to our novel methods of instruction and business, is that of the *International Text Book Co.* v. *Pigg*, 30 Sup. Ct. Rep. (1909) 481. The case was decided on an appeal from the Supreme Court of Kansas, denying the right of the plaintiff to enforce an action of contract in the Kansas courts. A brief resume of the facts and decisions are as follows:

Correspondence Schools Engaged in Interstate Commerce

The plaintiff is a Pennsylvania corporation engaged in giving educational correspondence courses through the mails. In various localities in the different States, it maintains "solicitor-collectors," whose duty it is to enroll pupils and collect the money they contract to pay from time to time in consideration of the instruction given them. This money is forwarded to the home office of the company. The expense of the office at Topeka was borne by the agent and not by the company, which had no office in the State. The defendant enrolled as a pupil in commercial law, and after paying a few instalments, repudiated the contract. We cannot help remarking, in passing, that he must have been a very apt scholar, for with only some five dollars' worth of instruction, his opinion that he could do this with impunity was upheld in three courts before reversal.

The Kansas statutes provided that a foreign corporation could not do business in the State, nor seek relief in its courts without first filing a paper setting forth its capital, amount of stock, par value, stockholders' addresses, and so forth. This had not been done by the plaintiff, who was consequently not allowed to bring suit on the broken contract.

The Supreme Court in reversing this position decided (1) that the plaintiff was doing business in Kansas within the meaning of the statute; (2) a correspondence school, which solicits business in the various States by means of agents, and furnishes instruction through the mails to the pupils obtained by them, is engaged in interstate commerce; (3) a statute of the nature of the one under discussion imposes a *condition* upon a corporation of another State seeking to do business in Kansas; and, as the business is interstate, that is a regulation of interstate commerce and a direct burden thereon. The statute was, therefore, held unconstitutional, both as regards the filing of the certificate and the prohibition of the right to sue in a Kansas court, the latter clause being, in the court's judgment, so closely interwoven with the former as to stand or fall with it.

See article in AMERICAN LAW REGISTER for April 1910, entitled "The Application of the Commerce Clause to the Intangible."

CONTRACTS.

A special contract was entered into by which the plaintiff agreed to tear out an existing cellar under the house of the defendant and replace same with a "perfect waterproof" one. When completed, the cellar was found to leak, and the efforts of the plaintiff to remedy the same proved unavailing. The plaintiff brought an action on the special contract and on the common counts to recover the price. The court charged that the plaintiff could recover on the common counts for the value of the benefit which the defendant derived from such performance on the part of the plaintiff. *Merritt & Co.* v. *Layton*, 75 Atl. (Del., 1910) 795.

Breach: Substantial Performance: Quantum Meruit

CONTRACTS (Continued).

On the question of the right of recovery for substantial performance of a contract the courts are divided. Where performance on the part of the plaintiff is a condition precedent to performance on the part of the defendant, there can be no recovery on the contract. Under the rigorous view of the common law, there could be no recovery either on the contract or on the *quantum meruit*. *Ellis* v. *Hamlin*, 3 Taunt. 53; *Munro* v. *Butt*, 8 E. & B. 738. This hard rule has, however, received modifications in many jurisdictions in this country. Where the defects are only slight, performance of such is not considered as a condition precedent and recovery may be had on the contract. *Woodward* v. *Fuller*, 80 N. Y. 312; *Nolan* v. *Whitney*, 88 N. Y. 648; *Fitzgerald* v. *La Porte*, 64 Ark. 34; *Anderson* v. *Todd*, 8 N. Dak. 158. But where the defects are substantial, there can be no recovery. *Spence* v. *Ham*, 163 N. Y. 220; 57 N. E. 412; *Denton* v. *Atchinson*, 34 Kans. 438; *Champlin* v. *Rowley*, 18 Wend. 187. A further modification exists in some States, where the performance has been completed by the plaintiff in good faith and has proved beneficial to and has been accepted by the defendant; though the plaintiff may not recover on the contract, he may yet maintain a *quantum meruit*. *McClay* v. *Hedge*, 18 Iowa, 66; *Blood* v. *Enos*, 12 Vt. 625; 26 Am. Dec. 363. The basis of such recovery is the benefit conferred on the defendant. The right of recovery is in no sense consensual, but is based on an obligation imposed by law; or, in other words, is quasi-contractual. Where the defendant has derived no benefit, there can be no recovery. *Appleby* v. *Myers*, L. R. 2, C. P. 651; *Fildew* v. *Bisby*, 42 Mich. 100; 36 Am. Rep. 433; 3 N. W. 278; *Genni* v. *Hahn*, 82 Wisc. 90; 51 N. W. 1096. If the contract is so badly performed as to be of no benefit to the defendant, there can be no recovery, even for materials. *Gazzan* v. *Kirby*, 8 Port. (Ala.) 253; *Taft* v. *Montague*, 14 Mass. 281; 7 Am. Dec. 215. Nor will the fact that performance has been expensive to the plaintiff give him a right to more than the benefit conferred upon the defendant. *Peacock* v. *Gleesen*, 117 Iowa, 291. Under one view of the case, recovery on the common counts depends upon actual acceptance on the part of the owner. *Bozarth* v. *Dudley*, 15 Vr. (N. J.) 504; *Dermott* v. *Jones*, 2 Wall. 1; but in Massachusetts, at least, where value has been conferred upon the property of the owner and there has been no gross or fraudulent violation of the contract, acceptance is presumed. *Hayward* v. *Leonard*, 7 Pick. 181; 19 Am. Dec. 268.

The measure of damages may assist in determining the basis of recovery where the defendant has derived benefit. The attitude of some courts fixes the amount of recovery as the contract price less the cost of rendering the work equal to that contemplated by the contract. *Gillman* v. *Hall*, 11 Vt. 510; *Palmer* v. *Co.*, 188 Ill. 508; 59 N. E. 247; *McKinney* v. *Springer*, 3 Ind. 59; 54 Am. Dec. 470. And the party relying on such substantial performance must prove the expense of supplying such omissions. *Spence* v. *Ham*, *supra*. This measure of recovery may, however, prove unjust if strictly enforced, for the defendant may derive substantial benefit from the work performed, yet the deduction of the cost of making the work conform to the contract would wholly deprive the plaintiff of compensation. *Pinches* v. *Swedish Church*, 55 Conn. 183. In other jurisdictions it is recognized that the right of action is purely quasi-contractual, and the measure of damages is the value of the benefit conferred, having reference to the contract price; and this benefit is ascertained by deducting from the contract price the diminution in value by reason of the non-performance of the contract. In *Gillis* v. *Cove*, 177 Mass. 584; 59 N. E. 455, the court seemed inclined

CONTRACTS (Continued).

to a theory of unjust enrichment, but it is submitted that the true decision of the case recognizes the benefit to the defendant as the correct rule. And the burden of proof is on the plaintiff to show the value of such benefit; this is not satisfied by mere proof of labor and materials furnished. See, also, Page, Contracts, Vol. II, §1603.

Right of recovery, in any event, depends largely upon the good faith of the plaintiff. If the breach is wilful, there can be no recovery. *Van Clief* v. *Van Vechten*, 130 N. Y. 571; *Gillespie* v. *Tool Co.*, 123 Pa. 18.

For an admirable discussion of the cases, see Clark: Architect, Owner and Builder. (Macmillan, 1905.)

Right of Beneficiary to Sue on a Contract

A, the mother and sole heir of a decedent, entered into an agreement with B, the uncle of the latter. By this contract A promised to give a share in the decedent's estate to C, an aunt of the decedent, in consideration of B's joining in the administration and in certain incidental litigation, without any charge for his services. It was held that C could not enforce the contract against A, inasmuch as she was not a party either to the contract or to the consideration. *Mallalieu's Estate*, 42 Pa. Sup. Ct. 101 (1910).

The right of a third party to sue on a contract of which he is the beneficiary, is a question which is involved in hopeless confusion and conflict in the different jurisdictions. The prevalent general rule is that the beneficiary cannot enforce the contract, but in almost every State the rule has been somewhat modified so that in cerain instances he can maintain an action. The Pennsylvania doctrine is well settled. The beneficiary cannot sue unless money or other valuable property has been transferred to the promisor as the consideration for the promise to make a payment to the third party. The promisor, it has been said, has to be made, in effect, a trustee for the third party before the latter can sue him. *Hostetter* v. *Hollinger*, 117, Pa. 606 (1888); *Torrens* v. *Campbell*, 74 Pa. 470 (1873); *Delp* v. *Brewing Co.*, 123 Pa. 42 (1888); *Vincent* v. *Watson*, 18 Pa. 96 (1851). This "trust fund" doctrine is peculiar to Pennsylvania and has been severely criticized as "an unwarranted extension of the law of trusts." 15 *Harv. Law. Rev.* 780. However, that may be, it has the advantage of being a well-settled doctrine and comparatively simple. The only point of difficulty is whether in a specific case this trust relation exists. The decisions are somewhat in conflict on this, the tendency seeming to be to allow the beneficiary a right of action when it is rather doubtful whether any trust has been created.

Applying this doctrine to our principal case, the Court properly refused the beneficiary a right of action. There was no transfer of money or trust poperty, but merely a perfomance of services by the promisee for the promisor. It has long been settled that this is not sufficient to allow the third party to sue. *Edmundson* v. *Penny*, 1 Pa. 334 (1845). In most jurisdictions where the beneficiary is allowed to sue no distinction is made when the promise is based on the rendition of services rather than a transfer of property. *Strong* v. *Marcy*, 33 Kan. 109 (1885); *Buchanan* v. *Tilden*, 158 N. Y. 109 (1899).

The case would be decided the same way in most jurisdictions, as it falls within what is known as the "sole beneficiary" class; *i. e.*, where the promisee enters into the contract solely to benefit the third party. *Whitehead* v. *Burgess*, 61 N. J. L. 75 (1898); *Irwin* v. *Lombard Univ.*, 56 Ohio D. 91 (1897); *Felch* v. *Taylor*, 13 Pick. 133 (1832).

CONTRACTS (Continued).

In the case of *Morecraft* v. *Allen*, 75 Atl. 920 (N. J.), the defendant was indebted to the plaintiff for board furnished prior to 1904 under a then existing contract. The parties at that time not being able to agree on amount due under the contract, they adjusted their differences by another contract, whereby the defendant obligated herself to pay the other a fixed sum of money in settlement of their mutual accounts.

Substitution of New Contract

The court held that the later contract, under the doctrine of novation, was substituted for the earlier contract and the rights of the parties were controlled by its terms; the earlier contract being thereby extinguished. Therefore, the Statute of Limitations commenced to run only from the inception of the substituted contract, and not from the time of contraction of the original debts.

This case is in line with the well recognized doctrine that when damages are unliquidated, a fair and final settlement or compromise of a claim which has some legal merit, though less in amount than was claimed, will be looked upon by the courts with favor on the principle, "*Interest reipublicae ut sit finis litium.*" *Specialty Glass Co.* v. *Daley*, 172 Mass. 460; *Morehouse* v. *Second National Bank*, 98 N. Y. 503; *Stony Creek Milling Co.* v. *Smalley*, 111 Mich. 321; *Connelly* v. *Devoe*, 37 Conn. 570.

CRIMES.

A recent English case, *The King* v. *Porter*, K. B. 369 (1910), decides that an agreement to indemnify bail is an act tending to produce a public mischief and makes the parties to it guilty of a criminal conspiracy, regardless of the fact that the agreement was not entered into with a view to the criminal's absconding. The court refused to entertain the view that such an agreement was a mere contract of suretyship and hence involved no illegality. Their reason was, that if such were the case, the bail would not be interested in getting the criminal before the bar of justice, and criminals, particularly if possessed of means, would abscond from justice.

Agreement to Indemnify Bail

There seem to be no cases in our books in point, and it is a more or less recognized practice in this country. Our point of view must be that the financial loss is sufficient to deter the criminal from running away.

EQUITY.

A, honestly believing that C had obtained money from him under false pretences, took a deed to certain property from B, the father of C, promising that in consideration of the giving of the deed by B, he would not prosecute C on the criminal charge which he had contemplated. B was induced to give the deed by the threats of A to institute the prosecution and did so solely to save C.

Relief Against Duress: Stifling of Criminal Prosecution

Held: B is entitled to relief against the deed, for though a party to an illegal contract, he is not in *pari delicto*, but acted because of duress. Deed ordered canceled. *Bell* v. *Ward*, 74 Atl. (N. J. 1909) 158.

The courts of law and equity have, in modern times, recognized this exception to the rigor of the rule that the law will leave the parties to an illegal contract as it finds them and will neither enforce the

EQUITY (Continued).

contract, if executory, nor restitution if executed. *Medearis* v. *Granberry*, 38 Tex. Cir. App. 187; *Swope* v. *Jefferson Insur. Co.*, 93 Pa. 251.

This exception rests upon a doctrine of duress. "Courts of equity will watch with extreme jealousy all such contracts and if there is ground to suspect oppression will set the contract aside." *Holt* v. *Agnew*, 67 Ala. 360. And the same principle is applied in courts of law to allow recovery of property transferred under such an illegal contract. *Mills* v *Hudgins*, 24 S. E. (Ga.) 146. But the absence of evidence of oppression and submission thereto is fatal and the general rule applies. *Gregor* v. *Hyde*, 10 C. C. A. 290. It is now generally recognized that threats of the prosecution of a near relative for an alleged criminal offense, believed in by the petitioner, and inducing him to change his legal position on a promise to stifle the prosecution, will, if proved to be the cause of his action, constitute such duress as will entitle him to relief in equity. *Amer. Garringe* v *Reed*, 63 Pac. (Utah) 902; *Barton* v. *McMillan*, 42 So. (Fla.) 849; *Gray* v. *Freeman*, 84 S. W. (Tex.) 1105; *Davis* v. *Smith*, 44 Atl. (N. H.) 253. Eng.: *Williams* v. *Bayley*, L. R. 1 H. L. 200; *Davis* v. *London Insur. Co.*, L. R. 8 Ch. Div. 469. Some doubt seems to be placed on the above proposition in New York. *Haynes* v. *Rudd*, 102 N. Y. 372 (1886), but that case can hardly be supported in view of the later decision in *Schoener* v. *Lissauer*, 107 N. Y. 111 (1887), and the language of *Adams* v. *Irving National Bank*, 116 N. Y. 606 (1889).

In early law one could not avoid his deed on account of the duress of another. Cro. Jac. 187. But the rule has been modified so as to allow a father to plead duress of his child. *Wagner* v. *Sands*, 1 Freem. 351, or a wife that of her husband, *Bayley* v. *Clare*, 2 Browne, 276. And threats of imprisonment of a nephew made to an aunt have been held duress of her. *Henry* v. *State Bank*, 107 N. W. (Iowa) 1034. But the rule is not extended further. *E. Stroudsburg Nat'l Bank* v. *Semple*, 29 Pa. C. Ct. 245.

Whether there has been duress is a question of fact in each case. The question is, was the person so acted upon by the threats as to be bereft of the quality of mind essential to the making of a contract and was the contract thereby obtained? *Galusha* v. *Sherman*, 81 N. W. (Wis.) 495. If so, and the threats are of imprisonment of a near relative, the law will consider that sufficient duress to avoid the contract. *First Nat'l Bank* v. *Payne*, 42 S. W. (Ky.) 736; or to entitle the party to relief in equity, *Schoener* v. *Lissauer, supra;* or to recover money paid if contract be executed, *Mills* v. *Hudgins, supra.* And threats antecedently made have even been held to color a conveyance subsequently made so as to permit avoidance of the deed. *Leflore County* v. *Allen*, 31 So. (Miss., 1902) 298. In Pennsylvania it has been held that a failure to show a promise was made not to prosecute, or a promise to abandon the same, would be sufficient to defeat proof of the duress necessary to relief. *Moyer* v. *Dodson*, 212 Pa. 344.

It is said the question whether a crime has in fact been committed is immaterial. In either case, the threat of criminal prosecution for private purposes and abandoned for private ends, is opposed to the policy of the law. *Heaton* v. *Norton State Bank*, 52 Pac. (Kan., 1897) 876; *Woodham* v. *Allen*, 62 Pac. (Cal.) 398. But the fact that the party making the threats acted in bad faith, never contemplating any actual prosecution, has been held material in New York and sufficient to allow recovery of money paid, though in that State there may be some question of the doctrine in absence of such added circumstance. *Jaeger* v. *Koenig*, 62 N. Y. Supp. 803.

EQUITY (Continued).

If notes are given on an agreement to stifle threatened prosecution, not only the execution thereof, but the payment, must be under the fear of such threats to enable recovery. *Schultz* v. *Culbertson*, 46 Wis. 313; *Woodham* v. *Allen*, *supra*.

The opinion in the principal case is a valuable discussion of the points involved and an able review of the authorities.

MASTER AND SERVANT.

In the case of *Ploof* v. *Putnam*, 75 Atl. 277 (Vt.), defendant's servant, who was in charge of defendant's island in Lake Champlain, pursuant to his instructions to keep off trespassers, refused to permit plaintiff to tie up his sloop to defendant's dock during a storm, by reason of which the sloop and her cargo were lost and plaintiff and his family were thrown into the sea and injured.

Wilful Tort of Servant

The courts found as a matter of law that this act was within the apparent scope of the servant's authority, and that though ordinarily it would have been a proper act, under existing circumstances, it was unlawful. The court then stated the following rule of law: That a master is liable for the act of his servant, although it is wilful and malicious, when it is done in furtherance of the master's business and within the scope of the servant's employment. The test is not the character of the act itself, nor whether it was done during the period of employment, but whether it was done to carry out directions of the master, express or implied, or to effect some purpose of the servant alone. In other words, if the servant cast off the rope intending thereby to carry out his instructions and perform his duty as caretaker of the property, the defendant is liable; if he cast it off not for this purpose, but only to serve some purpose of his own, the defendant is not liable.

This case is in line with the weight of authority; see *Rounds* v. *D. & L. R. R.*, 64 N. Y. 129 (1876); *Hoffman* v. *N. Y. C. R. R.*, 87 N. Y. 25 (1881); *Brennan* v. *Merchant & Co.*, 205 Pa. 258 (1903); *Rochester* v. *Bull*, 58 S. E. 756, 1907 (S. C.); *Columbus R. R.* v. *Woolfolk*, 58 S. E. 152, 1907 (Ga.).

But see the following cases in which the master was held liable for wilful and wanton injury of a third person by the misuse by the servant of an instrument entrusted to his care. *Toledo, Wabash & St. R. R.* v. *Harmon*, 47 Ill. 298 (1869); *Texas & P. R. R.* v. *Scoville*, 62 Fed. 790 (1894).

In *McCall* v. *Wright*, 91 N. E. (1910), 516, the question arose on appeal, as to the right of an employer to an injunction to restrain an employee from entering the employ of a rival concern, where the employee was in a position of great responsibility, thoroughly familiar with all phases of his employer's business, in possession of valuable trade secrets and bound by contract not to enter the service of other similar concerns for six years.

Master's Right to Enforce Contract of Employment: Injunction

In this case the contract of employment set forth that the defendant was to perform such duties as were assigned him, and to further the business of his employer to the best of his ability, in return for which he was to receive a very large compensation. The contract was terminable, at the option of the employer, on thirty days' notice, and contained an express provision that the defendant was not

MASTER AND SERVANT (Continued).

to enter the employ of any rival concern for six years, the period of the contract, and that if he did so the employer should be able to restrain him by injunction. In direct violation of this agreement, the employee, a few months after making it, left the plaintiff's employ and became president of a corporation in a similar line of business. Alleging irreparable damage, the former employer asked for and obtained an injunction to restrain him, from which order the defendant appealed.

There seems to be little doubt that such a contract, though to a certain extent in restraint of trade and competition, is not against public policy and is enforceable at law. Such agreements have been frequently upheld when incorporated with agreements for the sale of a business. *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473 (1887); *Wood* v. *Whitehead Bros. Co.*, 165 N. Y. 545 (1901), and also in the case of employees in *Magnolia Metal Co.* v. *Price*, 72 N. Y. Sup. 792 (1901); *Mutual Milk Co.* v. *Heldt*, 105 N. Y. Sup. 661 (1907); *Vulcan Detinning Co.* v. *American Can Co.*, 67 Atl. Rep. 339 (1907). It was urged, however, in support of the defendant's position, that there was no mutuality in the contract, since it was terminable at the option of the employer. It would seem, however, that there was not much basis for this contention, since there was a good consideration for the contract, and as far as the employer was concerned, he had not exercised his option; nor was it even shown he ever intended to. The court, having come to the conclusion that, on the above reasoning, the contract was a valid one, affirmed the injunction on the ground, principally, that irreparable injury to the plaintiff, for which no adequate remedy seemed to exist, had been shown. So it would seem that in the case of every such contract, if the employer can convince the court of the inadequacy of other remedies to compensate for the loss he will sustain by his employee's deserting his service for that of a rival, to whom he carries an intimate knowledge of the former's methods of business, which will cause irreparable damage to the plaintiff, a court of equity will afford him relief by injunction.

NEGLIGENCE.

Telegraph Company: Loss of Contract Natural and Probable Cause of Negligence

The defendant telegraph company negligently transmitted plaintiff's prepaid message to addressee as a collect message, charges being again paid by addressee. The message contained an offer to sell goods and the plaintiff alleged the offer was not accepted for the sole reason that the addressee was "huffed" at receiving a collect message from the plaintiff and accordingly refused to contract with him, to the loss of the plaintiff. *Held:* The plaintiff is entitled to recover for damages arising from this form of negligence of a telegraph company as well as from any other form. But the direct cause of the loss here was addressee's independent exercise of his right to reject the offer of the contract, and as it cannot be proven with any degree of certainty that the failure to accept was caused by the fact that the message was sent collect, the relation of legal cause and effect is not sufficiently established between the negligence and the damage to allow plaintiff to recover. Judgment given for cost of the message alone. *Hall* v. *Western Union Telegraph Co.*, 51 So. (Fla., 1910) 819.

The precise question does not appear to have been before the courts before. But where A has sent a telegraph message to B offering the contract, which message the company failed to deliver, it generally has been held that A may not recover compensatory damages, for his loss

NEGLIGENCE (Continued).

is contingent upon the acceptance of the contract by B—upon the independent will of the addressee, B—and no recovery is given for a contingent loss. *Beatty Lumber Co.* v. *Western Union Tel. Co.*, 52 W. Va. 410 (1903). Moreover, if the jury find as a matter of fact that if the telegram had been received, the addressee would have accepted the offer, the case is unaffected. *Smith* v. *Western Union Tel. Co.*, 83 Ky. 104. The court said in this case, "What a person might or would have done in a certain event is not the proper subject of a special finding and will not be considered." And the same position is taken in *McCaul* v. *Western Union Tel. Co.*, 45 Amer. R. 496. On the other hand, in some cases the courts have reviewed the evidence, and being convinced the contract would have resulted, allow a recovery of expectable profits. *Western Union Tel. Co.* v. *Wilhelm*, 67 N. W. (Neb.) 870; *Kemp* v. *Western Union Tel. Co.*, 44 N. W. (Neb.) 661. And evidence that a physician who had been summoned, *i. e.*, offered a contract, required a guaranty of his fee before responding, was excluded in *Western Union Tel. Co.* v. *Henderson*, 7 So. (Ala.) 419. In Pennsylvania it has been held the complaint must allege that had the message been delivered, the addressee would have accepted the contract offered. *Ferguson* v. *Anglo-Amer. Tel. Co.*, 151 Pa. 211. This intimates that the action for damages for loss of expectable profits might be maintained if allegations and proof establish that the contract would otherwise have been made.

The principal case indicates that the Florida courts are in accord with the former line of cases, holding that when the contingency of the acceptance depends upon the independent will of the addressee of the message, it was a natural step to hold where the message was delivered, that the fact that its non-acceptance depended upon the defendant's negligence in sending it "collect" was too conjectural and improbable even to go to the jury. Being received and not accepted, it would be an inconsistent position to allow a jury to guess that the reason therefor was the indignation of the addressee at having to pay the charges, when not being received, the same court would have refused to hear evidence that otherwise it would have been accepted.

PUBLIC COMMISSIONS.

Two recent cases defining the extent of the liability of acts of public commissioners to collateral attack, are found in the recent advance sheets. In *Emmons* v. *U. S.* (C. C. Oregon, 1909) the general proposition was laid down that the Land Department of the United States, in passing on questions of fact within the scope of its jurisdiction over the sale and disposal of public lands, acts judicially, and its judgments are binding and final, and preclusive of matters adjudicated in other proceedings. This principle has been established before. *Smelting Co.* v. *Kemp*, 144 U. S. 636.

Collateral Attack on Decision of Public Commissions

In New Jersey, in *Attorney General* v. *Sooy Oyster Co.* (76 Atl. Rep. 211), 1910, the court distinguished between generic and specific jurisdiction, and declared that the lack of the former only is of avail in collateral attack. However, it was only by a divided court that it was held that a decision that certain riparian land was not oyster beds, under the statute empowering them to grant such land as was not natural oyster beds, was an exercise of their specific jurisdiction, which must be attacked directly. Half of the court agreed with Swayze, J., that their generic jurisdiction was "not to grant oyster beds;" and that it

PUBLIC COMMISSIONS (Continued).

would be in opposition to public policy—in that the practical effect of a contrary decision would be to establish the validity of the grant for all time—for it would be inequitable for the State in chancery to take away the subject of such grant, after it had been improved by the grantee.

The result of such reasoning would be to take away from the public commissions created by the legislatures of our various jurisdictions that final authority in the decisions of questions of fact relating to the public domain, which the legislatures apparently, from the acts creating them, intended to vest in them.